

Treaty Indian Tribes And The ESA

Introduction

For a quarter century, the federal Endangered Species Act has been the United States' most powerful tool to prevent species extinction. The ESA gives federal entities the ability to regulate and even halt activities detrimental to the continued survival or recovery of a weak stock, giving that species an opportunity to rebuild.

While the ESA offers a promise of protection and restoration of endangered or threatened fish, wildlife and plant species that are important aspects of tribal religions, cultures and economies, it also poses a threat to tribal sovereignty and treaty rights.

ESA issues affecting tribes arise in the context of on-reservation resource management and tribal development activities, as well as off-reservation resource management issues, including the exercise of treaty-reserved fishing, hunting, and gathering rights.

There are currently nine salmonid populations in the Pacific Northwest with ESA protection: Snake River sockeye and upper Columbia River steelhead are listed as endangered; Snake River spring/summer chinook, Snake River fall chinook, Snake River steelhead, Umpqua River cutthroat trout, lower Columbia River steelhead, Oregon coastal coho, and Columbia River bull trout are listed as threatened.

In western Washington, the marbled murrelet and northern spotted owl – birds that require old growth forests for survival – have

been on the endangered species list for a number of years. This March, the National Marine Fisheries Service (NMFS) is expected to add Puget Sound chinook, Hood Canal/Strait of Juan de Fuca summer chum, and Lake Ozette sockeye salmon to the list of "threatened" species in our state.

Recommendations for bull trout listings had been completed, but court action forced the federal government to re-open its review of the anadromous trout. Bull trout have been proposed for listing as threatened with a final listing action expected this June. The status of cutthroat trout and coho salmon is currently under review, and it is uncertain when any listing recommendations would be made.

These listings, particularly Puget Sound chinook, will mark one of the first times ESA has been implemented in a large metropolitan area.

The Tribes And ESA

Western Washington Indian tribes have a unique place in the ESA issue. The tribes signed treaties with federal government representatives in the 1850s that guaranteed them the continued right to fish in all usual and accustomed places in exchange



A tribal/state captive breeding program for Dungeness River chinook is helping to rebuild the stock.

for the peaceful non-Indian settlement of most of the land west of the Cascade Mountains.

Those treaties were ignored or forgotten for decades, and it wasn't until the 1974 Boldt Decision (*U.S. v. Washington*) that the tribes were re-established as co-managers of salmon and steelhead resources in western Washington.

The courts – including the United States Supreme Court – have ruled that the tribes are entitled to half of the harvestable surplus of salmon and steelhead in western Washington. Treaty fishing is a right; all other fishing is a privilege. Along with this right came the responsibility of managing treaty-reserved resources.

Although no western Washington salmon stocks have yet been listed, the tribes already have adjusted treaty-reserved activities because of weak stocks and to protect ESA-protected species. Gillnet fisheries for sockeye salmon in the San Juan Islands have been altered to reduce the potential impact to the threat-

ened marbled murrelet, a robin-sized sea-going bird that can become entangled in fishing gear. Coastal fisheries, in which tribes participate, have been reduced to lessen impacts on migrating Snake River chinook.

Some tribes with forestry programs have reduced on-reservation timber harvests to preserve habitat for the endangered northern spotted owl, which, like the marbled murrelet, relies on old-growth timber for survival.

Because tribes have always depended on natural resources for their economic, cultural and spiritual survival, they have become increasingly concerned with the ESA as the list begins to grow.

In the past, tribes have expressed concern that insensitive federal administration of the ESA has interfered with the exercise of treaty rights, the development and management of natural resources, and the practice of traditional religions and ceremonies.

Because a large percentage of tribal land is held in trust by the federal government, federal agencies acting on behalf of the tribes were subjecting some of those lands to far more stringent restrictions than private lands. For example, federal agencies citing ESA concerns have delayed or denied approval of projects pivotal to the health and welfare of tribal communities.

Tribes were being penalized for being good stewards of their lands, which were sometimes becoming safe havens for many threatened or endangered species. While not responsible for the loss of habitat and destructive management practices on non-Indian lands that

were contributing to the decline of salmon species, the tribes were nonetheless being asked to shoulder a disproportionate share of the conservation burden.

Joint Secretarial Order Regarding Tribal Rights, Federal Trust Responsibilities And The Endangered Species Act

In 1996, facing the likely reauthorization of the ESA, treaty Indian tribes from throughout the United States began working with the federal government on an administrative policy that would harmonize the ESA with treaty-reserved rights and resources. In June 1997 the secretaries of Commerce and Interior signed a secretarial order to “reconcile” the special relationship between treaty Indian tribes, the federal government and the ESA, and addressing tribal rights and the federal government’s trust responsibility.

The order recognizes tribal sovereignty and provides the framework within which the tribes and federal government can work cooperatively to harmonize treaty rights with the ESA.

“Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws,” the order states.

“The Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Con-

gressional and Administrative policies promote tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The Departments recognize that Indian tribes are governmental sovereigns; inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources.”

Specifically, the order calls for a government-to-government working relationship between federal agencies and the tribes that will:

- ◆ Promote healthy ecosystems;
- ◆ Recognize the tribes as the appropriate entities to manage Indian lands and resources;
- ◆ Support tribal measures that preclude the need for conservation restrictions; and
- ◆ Be sensitive to Indian cultures, religions, and spirituality.

Further, the secretarial order says the federal government “shall give deference to tribal conservation and management plans for tribal trust resources that govern activities on Indian lands and address the conservation needs of the listed species.”

The secretarial order also recognizes tribal concerns regarding access to uses of eagle feathers, animal parts, and other natural products for Indian cultural and religious purposes.

NMFS and the U.S. Fish and Wildlife Service (USFWS) have pledged to work cooperatively with the tribes in applying the secretarial order in the course of the listing process. Other federal agencies will soon follow these efforts as they begin to implement the ESA. Properly implemented, the secretarial order promises to reduce the possibility of long, costly litigation regarding tribal rights, trust responsibilities and the ESA.

The tribes met many times in 1998 with the federal agencies at the regional and local level to discuss implementation of the secretarial order, including a two-day meeting with USFWS, NMFS and tribes from throughout the West in the spring. The purpose of the meeting was to begin a dialogue over exactly what implementation of the secretarial order means. Work groups are continuing to define specific implementation steps. The tribes are eager to gauge the secretarial order's effectiveness with listings on major species just a few months away.

Tribal Intervention

From the tribal perspective, the ESA must do more than merely prevent extinction of fish, wildlife and plants by preserving remnant populations that are essentially little more than museum specimens. The ESA must restore these populations to healthy levels that may again support utilization.

The tribes have seen many streams lose their salmon runs, and they have refused to wait for federal government intervention before taking action. Steps have already been taken to strengthen and restore salmon populations in western Washington. Restoring fish – and fish habitat – has been a major tribal goal for many years.

In particular, the tribes have voluntarily made several time, place, and manner restrictions in treaty-reserved salmon fisheries in certain areas where protected species could be present. The tribes, as good resource managers carrying out their management responsibilities under the *U.S. v. Washington* federal court case, have always structured their fisheries based on a weak-stock management approach. They work to develop fishery regimes that will have the least impact on the weakest stocks while maximizing harvest opportunity on stronger wild and hatchery stocks.

Tribes have also taken the lead on key salmon recovery efforts such as the Wild Stock Restoration Initiative, and key habitat protection initiatives such as the Timber/Fish/Wildlife Agreement, and many others.

Wild Stock Restoration Initiative

State and tribal leaders came together in the early 1990s to develop the Wild Stock Restoration Initiative in response to the poor condition of some salmon stocks and anticipated ESA listings of some wild salmon stocks in western Washington.

The co-managers first developed an inventory of all salmonid stocks and their health. This systematic, scientific approach to the issue of declining fish runs has given the co-managers a wealth of information on the condition of the health of nearly every salmon and steelhead stock in the state, and clearly identifies those fish stocks that need immediate help. Data collection took several years, but the Salmon and Steelhead Stock Inventory is an invaluable tool for beginning restoration efforts.

The next step in the initiative is an inventory of habitat conditions. The Salmon and Steelhead Habitat Inventory Assessment Project gives managers a complete assessment of the effects of habitat loss and degradation in crucial watersheds on the health of all wild stocks.

Through the Wild Stock Restoration Initiative, the tribes are now defining management goals and objectives for fisheries and developing both regional and watershed specific plans.

Tribal Plans For Salmon Stock Recovery

The tribes and State of Washington, as co-managers of the salmon resource, have an obligation to protect salmon. Under that authority as defined in the *U.S. v. Washington* court ruling, the tribes will continue working with NMFS and USFWS through the secretarial order to develop recovery strategies for all salmonids in the case area, which is most of western Washington.

The tribes have been working hard to develop biologically sound recovery plans for Hood Canal summer chum, Puget Sound chinook, Lake Ozette sockeye and Puget Sound coho salmon. These individual plans will be submitted to NMFS and, hopefully, will become folded into a larger salmon recovery plan.

On-the-ground examples of how the policy will work are already showing results. A six-year-old tribal/state/federal effort to rebuild extremely low Hood Canal wild summer chum salmon stocks has resulted in improved returns for several years in a row. This has been accomplished through a combination of hatchery supplementation and extremely restrictive fisheries that have precluded much of the tribes' opportunity to fish on healthy coho stocks.

While much remains to be done, this demonstrated ability to cooperatively rebuild weak stocks is an important lesson for federal, tribal and state fisheries managers. It shows us that working together in the best interest of the resource is the best way to accomplish our goals.

Regional or watershed initiatives are at the heart of the wild stock recovery planning efforts supported by the tribes. The tribes are heavily involved in local watershed planning projects with clearly defined policy objectives that possess the necessary flexibility to implement performance measures and action strategies in light of location conditions.

Comprehensive species planning is just one example of how the tribes and state are responding to the needs of wild salmon in western Washington. Since 1993, the co-managers have been developing a Comprehensive Coho management plan to maintain and restore wild stocks in a manner that reflects the region's fisheries objectives, production constraints

and production opportunities.

Specific objectives of the Comprehensive Coho management approach have been identified and include: protecting the salmon production base and providing incentives for increased production; meeting allocation obligations, including treaty Indian fishing rights; stabilizing harvest levels on a year-to-year basis; and improving the current management approach.

Changes have been proposed – and in some areas, already made – in annual harvest management. Conflicts will be reduced by establishing pre-determined management actions for specific resource conditions. There will be a shift from pre-season fishery planning to in-season and post-season stock assessment. This approach is intended to work in concert with freshwater habitat improvements to optimize production capability.

A new Comprehensive Coho management “model,” designed to give fisheries manager an accurate reflection of how their management issues are affecting coho stocks, is expected to be completed in the first few months of 1999.

A process similar to the Comprehensive Coho fisheries management plan is being developed for chinook management in western Washington. The pace of Comprehensive Puget Sound Chinook management planning could be increased with the expected March ESA listing of Puget Sound chinook salmon.

Conclusion

The tribes believe the ESA can be administered in a manner that prevents species important to tribal communities from becoming extinct, and can be administered in a manner that reaffirms federal trust responsibilities, treaty-reserved rights, and tribal sovereignty. The tribes believe the ESA should have a standard of salmon stock recovery that not only saves species from extinction, but also allows for treaty-reserved harvests. Tribes believe that fish and wildlife resources and the ecosystems on which they depend must be managed in a holistic manner that recognizes that all things are connected.

Results of the Wild Stock Restoration Initiative – and the many ongoing efforts of the tribes and state to address the decline of wild salmon stocks – will figure prominently in the ESA decision-making process.

For More Information

For more information about the natural resource management activities of the treaty Indian tribes in western Washington, contact the Northwest Indian Fisheries Commission, 6730 Martin Way E., Olympia WA., 98516; or call (360) 438-1180. The NWIFC home page is on the World Wide Web at www.nwifc.wa.gov.